EMS Bowe (M) Sdn Bhd v KFC Holdings (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–67 OF 1996
KAMALANATHAN RATNAM J
12 JULY 1999

Agency *— Authority of agent — Draft letter of award issued by agent — Whether agent had authority to issue letter of award — Whether agent had authority to award tender draft award acted upon by offeree to the knowledge of offeror — Effect of award*

The plaintiff had submitted a tender proposal to the second defendant. Subsequently, the plaintiff was requested by the first defendant to submit samples and provide a warranty of material to be used. The second defendant prepared a draft letter of award in favour of the plaintiff. In view of the early commencement date and relying on the second defendant's statement that the plaintiff had been awarded the contract, the plaintiff ordered the materials. The defendants alleged that the first defendant had no authority to award the contract or execute any contract on behalf of the second defendant.

Held, allowing the claim:

(1) The plaintiff had dealt with both the first and second defendants. Since the first defendant had authorized the second defendant to prepare the draft letter of award, the second defendant had been duly authorized to communicate to the plaintiff that it had been successful in the tender exercise (see p 428B–C).

(2) A draft letter of award is not a concluded contract, but if the draft award is acted upon with the knowledge and concurrence of the other party, it is no longer merely a draft (see pp 428G–429A).

[Bahasa Malaysia summary

Plaintif telah menyerahkan suatu cadangan tender kepada defendan kedua. Seterusnya, plaintif diminta oleh defendan pertama untuk menyerahkan sampel-sampel dan memberikan waranti untuk bahan yang akan digunakan. Defendan kedua menyediakan suatu surat deraf memberikan award kepada plaintif. Memandangkan tarikh permulaan awal dan bergantung kepada pernyataan defendan kedua bahawa plaintif telah diawardkan kontrak tersebut, plaintif telah memesan bahan-bahan. Defendan-defendan mengatakan bahawa defendan pertama tidak mempunyai kuasa untuk memberikan award kontrak tersebut atau menyempurnakan apa-apa kontrak bagi pihak defendan kedua.

Diputuskan, membenarkan tuntutan tersebut:

(1) Plaintif telah berurusan dengan kedua-dua defendan pertama dan kedua. Memandangkan defendan pertama telah memberi kuasa kepada defendan kedua untuk menyediakan surat deraf

memberikan award, defendan kedua telah diberi kuasa seperti yang sepatutnya untuk berkomunikasi kepada plaintif bahawa plaintif telah berjaya dalam usaha tender tersebut (lihat ms 428B–C).

(2) Suatu surat deraf memberikan award bukannya suatu kontrak yang mengikat, tetapi jika tindakan diambil berdasarkan award deraf tersebut dengan pengetahuan dan persetujuan pihak yang satu lagi, ia bukan semata-mata deraf sahaja lagi (lihat ms 428G– 429A).]

Notes

For cases on authority of an agent, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 630–690.

Cases referred to

Ho Kam Phaw v Fam Sin Nin [1998] 2 MLJ 713 (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233 (refd)
Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd [1996] 2 AMR 1838 (refd)

Fiona Barnaby (*Cheah Yap & Partners*) for the plaintiff.
Ranjan Chandran (*Iza Ng Yeo & Kit*) for the first defendant.
Koh Yew Chong (*Shahrir bin Mohd Salleh* with him) (*Shahrir Ng & Koh*) for the second defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

FACTS

By a letter dated 1 August 1995 the second defendant, on behalf of the first defendant, invited the plaintiff to submit a tender for the works known as 'Proposed Wisma KFC on Lots 543 and 688, Section 57, Jln Sultan Ismail, Kuala Lumpur - Supply, Delivery and Installation of Suspended Mineral Fibre Board Ceiling' ('the works').

The plaintiff then by a letter dated 11 August 1995 submitted a tender proposal for the works for the sum of RM511,708.30 which was later corrected by letter dated 15 August 1995 to read RM518,923.90. The plaintiff submitted the tender proposal together with a sum of RM1,000. Subsequently, on 24 August 1995 the plaintiff was requested by the first defendant to submit samples of the material to be used for the works. The plaintiff also sent samples of the manufacturer's warranty to the first defendant. The plaintiff confirmed that the type of mineral fibre board required by the first defendant for the works, that is, the 32/6 panel, was only produced in 15mm x 600 x 600 as too many scores/panels in 15mm x 600 x 1200 would weaken the board. On or about September 1995, the second defendant prepared a draft letter of award to formalize the award of the Works and which said draft letter of award was addressed to the plaintiff.

CASE FOR THE PLAINTIFF

The plaintiff's case is that the second defendant went through the terms and conditions of the letter of award with the plaintiff's managing director and that the plaintiff agreed to the terms and conditions contained therein.

The second defendant then informed the plaintiff that the first defendant would issue the formal letter of award to the plaintiff in due course. The second defendant then instructed the plaintiff, inter alia, that the commencement date for the works was mid-October to early November. Due to the imminent commencement date for the works, the plaintiff's managing director informed the second defendant that the materials for the works had to be imported from abroad and that it would take eight to ten weeks to arrive. Thus the plaintiff informed the second defendant of the need to order the goods in advance to be able to commence and complete the works within the time stipulated. The second defendant agreed and then instructed the plaintiff to order the goods. Relying on the second defendant's statement that the plaintiff had been awarded the Works, the plaintiff ordered the materials for the works.

It is the plaintiff's case that in breach of contract, the works were then wrongfully awarded by the defendants to another contractor and that the plaintiff never received the letter of award.

THE CLAIM

The plaintiff brings this action for:

(i) Breach of contract against the first defendant upon an agreement entered into between the first defendant and the plaintiff through the second defendant, being the defendant's agent for awarding the works to another contractor.

(ii) Negligent misrepresentation against the second defendant for misrepresenting that the contract had been awarded to the plaintiff, and instructing the plaintiff to order the goods in advance as a result of the works being awarded to the plaintiff.

(iii) Negligent misrepresentation against the first defendant who is vicariously liable for the negligent misrepresentation made to the plaintiff by its agent, the second defendant.

CASE FOR THE DEFENCE

The case of the defendants is that there was no binding contract because the second defendant had no authority to award the contract or execute any contract on behalf of the first defendant.

FINDINGS OF THE COURT

Question of agency

The letter of invitation

The letter of invitation by the second defendant to the plaintiff whilst stating the heading as referring to the 'Proposed Wisma KFC' commences with a paragraph which reads as follows:

A On behalf of our client we wish to inform you that you are selected to submit tender for the above works.

The final paragraph of the said letter states as follows:

All completed tender shall be delivered to the office of M/s KFC Holdings (M) Bhd, Level 6, Wisma Hong Leong, 18, Jalan Perak, 50450 Kuala B Lumpur not later than 12 noon, 14 August 1995 in a sealed envelope endorsed:-

Tender For 'Proposed Wisma KFC on Lot 543 and 688, Section 57, Jalan Sultan Ismail, Kuala Lumpur — Supply, Delivery And Installation of Suspended Mineral Fibre Board Ceiling.

C This letter was in the common agreed bundle of documents (CABD 1 and 2). What is also relevant is a letter dated 24 August 1995 from the plaintiff to the second defendant referring to a telephone conversation between the general manager of the plaintiff and one Kuan Chee Keong (Kuan) relating to the size of the panel and enclosing a sample of the warranty of the manufacturer. The said letter which also was an agreed document was D CABD 16. This letter was copied to the said Kuan. The said Kuan was an employee of the first defendant. DW2, Koh Ken Lin, a quantity surveyor by profession and who was with the second defendant at the material time testified in examination-in-chief that the said Kuan who was the project manager of the first defendant requested the second defendant to provide E quantity surveying services and to act as the project consultant of a contract for ceiling works for the said Works. He also confirmed that all communications on behalf of the first defendant was done by Kuan. In fact the general manager of the plaintiff testified in examination-in-chief that Kuan had instructed the plaintiff to liaise with the second defendant and this was never challenged in cross-examination by either defendant. DW2 F also testified in examination-in-chief that the second defendant was engaged by the first defendant to carry out the said works 'on behalf of the first defendant'. The second defendant had instructed the plaintiff to submit samples directly to the first defendant.

Whilst it is conceded by the plaintiff that the second defendant has no G authority to award the contract to the plaintiff, the plaintiff contends that communicating the decision to the plaintiff that it was the successful tenderer is well within the apparent scope of authority of the second defendant.

It is admitted by DW2 that sometime in September 1995, he 'was *instructed* by Kuan of the first defendant to prepare a draft letter of award in H favour of the plaintiff'. He also admitted that he had 'gathered information from the plaintiff for confirmation purposes' and then he included 'those information in the draft letter of award'. The information gathered related to the type of performance bond to be given, the amount of the said performance bond and confirmation that the correct tender price was I RM518,923.90 and not RM511,708.30. It is necessary to reproduce a relevant Q/A from the evidence of DW2:

(Q) : Why did you require these information in order to prepare the draft letter of award?

(A) : We have no knowledge of the terms that were discussed or agreed upon which will normally take place in a meeting or interview between the first defendant and the individual tenderers because we were not instructed on anything pertaining to any meeting or interview. We cannot prepare the draft letter of award without these information.

I am therefore satisfied that the first defendant had not only instructed the second defendant to deal with the plaintiff but has also dealt directly with the plaintiff tenderer. Since the first defendant authorized the second defendant to prepare the draft letter, it is my judgment that the first defendant had by implication, authorized the second defendant to communicate to the plaintiff that it was the successful tenderer.

One other factor that I have to remind myself is the failure of the defendants to call Kuan to testify. The explanation that he would be unable until the second half of December 1998 is totally unacceptable. Evidence was led that he was at the time of the trial engaged in the construction and commissioning of a military fuel depot for the Ministry of Defence, Brunei. Other than the self-serving evidence of DW1 the senior general manager of the first defendant, no letter was submitted to this effect from the Ministry of Defence, Brunei. If his evidence was so crucial, no request for an adjournment was made to take his evidence in Brunei. In any event, this case was continued even on 6 January 1999. Yet no attempt was made to call Kuan. I am therefore constrained to invoke s 114(g) of the Evidence Act 1950 against the first defendant for failing to call Kuan to testify.

The tender

PW1, the general manager of the plaintiff, testified that the plaintiff accepted the offer made by the first defendant through the second defendant as contained in the draft letter of award. To my mind the defendants' contention that they had never accepted the plaintiff's tender does not reflect the true picture. Whilst the plaintiff had responded to the invitation to tender it is pertinent to note that there has been no formal written letter of rejection ever issued to the plaintiff in respect of its tender proposal by the first defendant. It is also important to note that the plaintiff's tender deposit was never returned to the plaintiff. I find that the second defendant's conduct was consistent with the belief that the tender had indeed been awarded to the plaintiff by the first defendant.

It was the contention of the first defendant that a draft letter of award does not constitute a concluded and binding agreement. It is but a draft until it is perfected. In support the defendants relied on *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 AMR 1838. In that case the court held, and rightly so, that a draft judgment did not have the force of law and that it needed to be perfected before being regarded as a judgment of the court. The first defendant urged me to apply the same rationale to a draft of any document like the draft of this letter of award. I cannot accept that. The decision in *Teoh Soon Kok* is based on the principle that until perfected, the terms of an order of the court cannot be enforced either by execution or any other mode of enforcement. Whereas a draft agreement or a draft letter of offer whilst notionally being a draft, yet if it is

A acted upon with the knowledge or concurrence of the other party or its agent, it can no longer be construed as a draft. The draft is therefore converted into a written agreement, based on the fact that one party had acted upon the terms, with the knowledge and concurrence of the other party. The first defendant also relied on *Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713 (CA). In that case both the appellant and respondent B were partners of a legal firm and since differences arose between them, they decided to terminate their partnership. Though the partnership was dissolved, there were certain assets retained by the respondent which were to be divided and settled between the parties. Negotiations were proceeding. The respondent, through his solicitors forwarded a draft settlement to the appellant. The appellant executed photostat copies of the C faxed draft and forwarded the same to the respondent's solicitors. It was contended by the appellant that the faxed draft constituted the final draft of the deed of settlement and that the appellant signed it to confirm that he agreed to the terms of the settlement. On the other hand the respondent contended that the facsimile was a mere proposal and that he had not agreed to the terms as contained in the facsimile. The issue before the Court D was whether the fax sent constituted an unqualified offer from the respondent's authorized agent (the solicitor) which the appellant was at liberty to accept so that an enforceable contract would immediately have come into being without any further formality.

The Court of Appeal held that the faxed draft was an offer by the E appellant's solicitors on the appellant's behalf to the respondent's solicitors for the respondent to settle on the terms of the faxed draft and no more. The respondent had not accepted the appellant's offer as he had not signed the faxed draft. There was therefore no contract binding between the parties.

Unfortunately, no evidence was led by the first defendant that the F second defendant was an independent contractor and that their relationship was one of contract for service. It is clear from the evidence adduced that the first defendant had been instructing the second defendant in respect of the said works. Clearly the first defendant retained control over the work designated to the second defendant. In the circumstances I am constrained to hold that the second defendant's employment was one of contract of G service. Once the second defendant is found to be employed by the first defendant then clearly the second defendant is the agent of the first defendant. In fact, 1(2) *Halsbury's Laws of England* (4th Ed) states as follows:

> The relation of agency arises whenever one person, called 'the agent', has H authority to act on behalf of another, called 'the principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. ...
>
> The essence of the agent's position is that he is only an intermediary between two other parties.

I

In the case before me, DW1 admitted that the second defendant was the intermediary between the first defendant and the plaintiff. In the circumstances it was well within the scope of the second defendant to have

informed the plaintiff that it had been awarded the contract for the Works and for the plaintiff to have acted on that information. In fact, *Halsbury's Laws of England* again at para 135 states as follows:

> Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions or limitations on its exercise, no act done by the agent in excess of the conditional or limited authority is treated as the act of the principal as regards such persons as have or ought to have notice of such excess of authority, or have had notice of an irregularity placing them upon inquiry as to whether the agent's authority was being exceeded. In the absence of notice, however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of his authority, by any particular instructions to his agent limiting his authority.

In the light of this passage from *Halsbury*'s the submission of the first defendant that even if the second defendant can be classified as being an agent of the first defendant the agency is one for the purpose of inviting tenders and nothing further, is totally unacceptable since the existence of the limited authority (if any) had not been brought to the notice of the plaintiff.

It is also my judgment that the agency arrangement between the second defendant and the first defendant need not be in writing (see decision of Court of Appeal in *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233). I therefore have no hesitation in finding that there indeed was a contract concluded between the first defendant and the plaintiff and that it is not open to the first defendant to now contend that there was none.

Alternatively, was there misrepresentation by the second defendant?

The second defendant told the plaintiff that the first defendant had awarded the contract to the plaintiff. It is the plaintiff's contention that it was this representation that induced the plaintiff to act and thereby to sustain loss. Further it was argued that the second defendant was in a position where it owed the plaintiff a duty of care as the intermediary between the first defendant and the plaintiff.

It is a fact no doubt that the plaintiff relying on the second defendant's statement, ordered the goods. However, it is also a fact that the contract was subsequently awarded to another contractor, thereby causing loss and damage to the plaintiff. Considering the facts of the case, it is my judgment that even assuming that the second defendant might not have been authorized expressly by the first defendant to inform the plaintiff, the first defendant is jointly and severally liable with the second defendant for the representation of the second defendant to the plaintiff because such a conveyance of the information to the plaintiff by the second defendant is within the scope of the second defendant's implied authority or within the scope of his apparent or ostensible authority to make such representation as to the award of the contract.

Tender not according to specifications

The first defendant pleaded that in any case the tender offer by the plaintiff was not according to the tender specifications. I note that PW1 testified that

A he supplied samples of the materials to Kuan of the first defendant, namely Nittobo Mineral Fibre Board 15mm x 600 x 1200 with 8 squares, pursuant to the first defendant's request made through the second defendant (see CABD 12). Kuan never attended court to refute this. Kuan in fact accepted this. Therefore, I find that this allegation of the defendants is unmeritorious.

B

Plaintiff ordered goods at its own risk

Another defence raised by the first defendant was that since there was no contract the plaintiff had ordered the goods at its own risk. In the light of my earlier finding, that there was indeed a concluded contract this C argument must perforce fail.

Second defendant did not instruct to order the goods nor made offers to the plaintiff

The second defendant argued that it had not given any instructions to the plaintiff to order the goods nor did it make any offers to the plaintiff. It is D interesting to note that both DW1 and DW2 testified that they assumed that written approval for the ordering of the goods had to be obtained from the second defendant since there was no architect for the project. On this alone, it is sufficient for me to accept the evidence of the plaintiff (PW1) that the second defendant had indeed instructed the plaintiff to order the goods in advance to allow for the start of the Works early. I therefore find for the E plaintiff against both defendants.

Quantum

The plaintiff's claim is for the sum of RM372,192.12 made up of as follows:

F

(a)	Loss of profits	RM67,776.12
(b)	Cost of storing the goods at the warehouse @ RM8,658 per month from 11 November 1995 to 9 February 1996 and continuing	RM17,316.00
(c)	Cost of goods amounting to	RM287,100.00
		RM372,192.12

G

H The plaintiff has led evidence to prove all of these items. It is trite law that the onus is on the plaintiff to specifically plead and prove its loss.

In response to the allegation that no proof has been tendered, the plaintiff relied on CABD 5 and 6 to show that the total contract sum was RM500,583.90 (that is, the total area of works being 13,441 + 1,283 + 750 = 15,474 metres square x RM32.35 per square metres being the contract I price). PW1 adduced evidence that the plaintiff's total cost of supply and installation for the 15,474 square metres at RM29.97 amounted to RM432,807.78. Therefore if the contract had been awarded to the plaintiff, the plaintiff contended it would have made a profit of RM67,776.12

(RM500,583.90–RM432,807.78). Neither of the defendants challenged these figures since the defence was that there was no contract.

As for the cost of the goods amounting to RM287,100 PW1 adduced evidence by explaining with reference to CABD 23 that the total purchase price was S$116,000 and that at an exchange rate then prevailing of RM1.80 this amounted to RM208,800 and logging on a 25% import tax and a 10% Government tax the total sum paid amounted to RM287,100. Again, neither this figure, nor the calculations, was ever challenged.

As for the cost of warehousing, the sum of RM17,316 was fully justified by PW1. He explained in examination-in-chief that the cost per shipment was S$2,405.40 and since there were two containers, this amounted to S$4,810.80. And again working on an exchange rate of RM1.80 it worked out to RM8,658 per shipment. Since there were two shipments the total warehousing costs amounted to RM17,316. I therefore give judgment for the plaintiff against the defendants in the sum of RM372,192.12 with interest at 4% pa from the date of service of the writ on the defendants to date of judgment and costs.

Application allowed.

Reported by Andrew Christopher Simon